IN THE

Supreme Court of the United States

October Term, 1970

No. 370

MAGNESIUM CASTING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

AND

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois 60603

ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE H. COHEN
BREDHOFF, BARR, GOTTESMAN,
COHEN, AND PEER
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

WARREN PYLE
44 School Street
Boston, Massachusetts
Attorneys for United Steelworkers of America, AFL-CIO

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Amid the technicalities and complexities of comprehensive briefs and reply briefs, and the profound erudition of fine legal points, there lurks a danger that the interests of the affected employees—those for whom the NLRB was enacted—may be overlooked. Regrettably, as we show below, petitioner, Magnesium Casting Company,[1] has effectively undermined the Act's purposes by interminably delaying its obligation to bargain with the representative chosen by its employees. It now challenges procedures adopted by the Board to minimize that delay.

On March 14, 1968, United Steelworkers of America, AFL-CIO,[2] filed a representation petition invoking the or-

[1] Hereinafter, "the Company."

[2] Hereinafter, "Steelworkers" or "the Union."

derly processes of the NLRB to establish its majority status in a unit of the Company's production and maintenance employees (App. 1). After a full scale evidentiary hearing upon due notice to all parties, the Regional Director, on May 22, 1968, issued a Decision and Direction of Election which, *inter alia,* rejected the Company's claim that three assistant foremen should be excluded from the unit because of their alleged "supervisory" status (App. 110-117). Thereafter, the Company filed a comprehensive Request for Review attacking the Director's Decision on the status of the three assistant foremen. The Request was denied by the Board on June 18, 1968, on the ground that it did not raise any substantial issue warranting review (App. 127).

A secret ballot election was conducted on June 21, 1968, in accordance with the Board's usual procedures and safeguards. The Steelworkers won the election decisively: the tally of ballots showed that of approximately 205 employees eligible to vote, 140 voted for the Steelworkers and only 59 voted against (App. 131).

Incredible though it may seem in light of the Union's 81 vote margin of victory, the Company has succeeded in denying all employees the benefits of collective bargaining for two and one-half years on grounds that, even if it were to prevail, would affect only the status of the three assistant foremen. This is an intolerable state of affairs which completely undermines the basic policy of the Act to encourage the practice and procedure of collective bargaining. See Sec. 1, National Labor Relations Act, 29 U.S.C. § 141.

The limited purpose of this brief is to emphasize the urgent need for expedition in the resolution of representation issues by all reasonable measures, including the technique employed by the Board here: granting summary judgment where the employer's refusal to bargain is designed merely to test the validity of a prior adverse determination in the representation proceeding which was made by the Regional Director and which the Board found did not warrant fur-

ther review. We leave to the brief of the Board the task of supporting what the court below articulated with compelling force: that the Board did not violate either Section 10(c) of the Act or the Administrative Procedure Act by employing summary judgment here.

The Steelworkers' interest, and indeed that of all labor organizations, in wishing to achieve quicker resolution of refusal to bargain cases needs little elaboration. Steelworkers presently represents approximately one and ¼ million employees in a number of industries, including steel, aluminum, can, copper, and metal fabricating. Its essential function is to organize production and maintenance employees and office and technical employees for the purpose of collective bargaining. To this end, it files hundreds of representation petitions annually, seeking recognition as exclusive bargaining agent in units embracing tens of thousands of workers.

The one major draw-back to invoking the Board's orderly secret ballot election procedure has been and remains today, the lack of expedition in obtaining a legally enforcible bargaining order. By delegating its function in representation cases to its Regional Directors, pursuant to Section 3 (b) of the Act as amended in 1959, the Board has reduced substantially the delay in the *initial stages* of the proceeding—*i.e.*, from date of filing of petitions up to and including holding hearings on such petitions, issuing decisions and thereafter conducting elections.[3] The rub comes, however, when a majority of the employees has voted for union representation and the employer chooses not to honor the electorate's wishes.

There is no legally enforcible obligation on any such recalcitrant employer to recognize the results of the secret ballot election. Rather, an employer has the option merely

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[3] From 1960 to 1969 the Board cut the median time lag from filing of petition to decision and/or direction of election from 78 days to 45 days. (Data obtained from NLRB Division of Administration.)

of refusing to bargain with the union. At that juncture, the union's only legal recourse is to file an unfair labor practice charge and thereby set in motion a lengthy sequence of proceedings which virtually guarantees the employer, at the very least, a two year period of immunity from collective bargaining during which employees are denied the benefits of bargaining.[4]

The general course of an unfair labor practice case is as follows:

> After an unfair labor practice charge is filed, the Regional Director orders an investigation; if it discloses that the charge is meritorious, as here, a formal complaint is issued; the employer is then accorded the opportunity to respond in a formal answer; the case is then assigned to a Trial Examiner who schedules and conducts a full scale evidentiary hearing on the complaint; thereafter, the Examiner prepares and issues a Decision and Order in which, *inter alia,* he makes findings of fact, conclusions of law, and recommends a remedial order, if necessary. The employer can continue to refuse to bargain even if the Examiner rules that it is violating the Act; thus, the employer may file exceptions and a supporting brief to the Board; in turn, the Board will then review such exceptions, brief, and the cited portions of the transcript of testimony before the Trial Examiner; and after said review the Board will prepare and issue its own Decision and Order. Once again, even if the Board finds a violation, the employer can continue to refuse to bargain, for the Board's orders are not self-enforcing. The case must

[4] For purposes of this portion of our brief we assume *arguendo* that the Board will continue to follow its current practice of not seeking injunctive relief under Section 10(j) of the Act, 29 U.S.C. § 160(j), in cases where an employer refuses to bargain with the Union to test the propriety of an appropriate unit determination made in a prior representation proceeding. It is our understanding that the Board has deviated from this practice so infrequently to date as to be *de minimis.*

still go to a Court of Appeals where more time is consumed with briefs, reply briefs, oral argument, and finally the preparation and issuance of the Court's opinion.

In sum, then, the customary elapsed time from the date that the Union achieves an election victory until the employer *must* bargain—or face the prospect of a contempt citation—is approximately 2-3 years.[5] This result is all the more shocking because so few refusal to bargain cases present close questions. Ross, *The Labor Law in Action; An Analysis of the Administrative Process Under the Taft-Hartley Act,* at p. 99 (1966).

Aside from the fact that this delay is totally unsatisfactory purely from the standpoint of an effective system of administering the Act, it produces unconscionable results. The employer derives economic benefits from its own wrongdoing by escaping, for an extended period of time, any obligation to bargain collectively. Conversely, the employees are deprived of the fruits of collective bargaining—the precise purpose for which they designated the union to serve as their exclusive representative. Quite naturally, in the process the employees become frustrated, demoralized and disappointed with the helplessness of their plight; become convinced that a union cannot serve their needs; and lose all respect for the Board's processes. The union's support necessarily dwindles with the passage of time and even if it could afford to expend the money and provide the staff required to keep its organizing campaigns active and func-

[5] The median time consumed between the filing of an unfair labor practice charge and the issuance of a Board decision is over 300 days (in fiscal year 1969 it was 324 days). The median time between issuance of the Board decision and the issuance of a court of appeals decree is approximately 550 days. (Data obtained from NLRB Division of Administration.) Thus, the median time consumed between the filing of the charge and the issuance of a court of appeals decree is well over two years. Cf. *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 611, n. 30 (1969).

tioning during this lengthy 2-3 year period—which few, if any, unions can—the result inevitably is that when the employer is finally ordered by the court to bargain the union's bargaining power is at a low ebb.

The consequences of delay were aptly described in a 1960 report to the Senate Labor and Public Welfare Committee by a tripartiate advisory panel headed by Archibald Cox:

> "In labor-management relations justice delayed is often justice denied. A remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for Government intervention."[6]

Precisely because of the foregoing, the Steelworkers, as well as other unions, have recently urged the Board to take more affirmative measures against employers in refusal to bargain cases. Specifically, the unions have urged the Board to take the profit out of delay, by ordering employers to compensate their employees for the loss of earnings reasonably attributable to the post-election period in which the employer's actions foreclosed collective bargaining. In our judgment, this kind of a remedy would have constituted a giant step in the direction of eliminating so-called "technical" 8(a)(5) violations where, as here, the employer opts to test the validity of an adverse ruling in a representation proceeding by subsequently refusing to bargain with the union. Unfortunately, however, in *Ex-Cell-O Corp.*, 185 NLRB, No. 20, 74 LRRM 1740 (Aug. 25, 1970) the Board decided by a 3-2 vote that it lacks statutory authority to issue an order compensating employees who have been unlawfully denied the fruits of collective bargaining.[7]

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[6] Organization and Procedure of the National Labor Relations Board, Report to Senate Committee on Labor and Public Welfare, Senate Document No. 81, 86th Cong. 2d Sess., 1-2 (1960).

[7] The Court of Appeals for the District of Columbia Circuit has on two recent occasions expressed *its* view that the Board *does* have authority to provide such a remedy, and has expressly disapproved *Ex-*

The summary judgment procedure utilized by the Board in this case is another, albeit much less effective, response to unconscionable delay. It will not deter delay, nor will it compensate the victims thereof, but at least it will *reduce* delay. It is designed to produce some modicum of expedition at the unfair labor practice stage by eliminating the necessity for an evidentiary hearing before a Trial Examiner where, as here:

> (1) the employer's defense to a refusal to bargain charge is that the Board made an inappropriate unit determination;
>
> (2) the employer received a full opportunity to present testimony, witnesses, and documentary evidence in support of its unit position in the representation hearing; and
>
> (3) in the interim, the employer has not come forward with any newly discovered evidence.

Under the summary judgment procedure as applied here, the employer's right to due process is protected (*i.e.,* by affording the opportunity to present newly discovered evidence) without sacrificing the employees' justifiable interest in obtaining a prompt order compelling collective bargaining. Stated otherwise, absent a showing by the employer of newly discovered evidence, "due process" does not require another hearing.

The efforts of the trade union movement to counteract interminable delay suffered a serious setback in *Ex-Cell-O.*[8] Now the Company would have this Court completely frustrate the Congressional desire for expeditious resolution of

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Cell-O. Southwest Regional Joint Board v. *NLRB,* No. 22,081 (D.C. Cir., Dec. 15, 1970) (slip. opin. p. 15); *International Union of Electrical Workers* v. *NLRB,* 426 F. 2d 1243 (D.C. Cir. 1970), cert. denied, 39 U.S. L.Week 3243 (Dec. 7, 1970).

[8] *Ex-Cell-O* is currently pending before the Court of Appeals for the District of Columbia Circuit on a petition for review.

representation issues by deleting from the Board's arsenal even so modest a procedural weapon as summary judgment. We think it would be anomalous indeed to accept the Company's argument that by amending Section 3(b) of the Act Congress expressed *only* a desire to expedite the resolution of representation issues where consenting employers were involved, but that this legislative objective was not applicable when an employer elected instead to refuse to bargain following the union's certification.

CONCLUSION

For the foregoing reasons, Steelworkers respectfully requests that the Court affirm the decision of the court below.

Respectfully submitted,

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois 60603
ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE H. COHEN
BREDHOFF, BARR, GOTTESMAN,
COHEN, AND PEER
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036
WARREN PYLE
44 School Street
Boston, Massachusetts
Attorneys for United Steelworkers of America, AFL-CIO